

Your Monthly Legal Update – April 2009  
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**AN EMPLOYEE CAN SUE AN EMPLOYER FOR A WAGES AND HOURS  
DIVISION CLAIM WITHOUT PURSUING THE COMPLAINT FIRST THROUGH  
THE DEPARTMENT OF WORKFORCE DEVELOPMENT**

Happy April everyone, on this gloomy April Fool's day. Don't know about any of you, but I definitely have spring fever. Hope the weather clears up soon. This month we are going to review Wage and Hours claims as far as their procedure and we will use an unpublished case of the Court of Appeals for this review, *Levin v. Gass & Riegert Auto Complex, Inc.*, Appeal No. 2008AP578 and 2008AP579 (March 26, 2009). This case is unpublished which means to us lawyers that we can only cite to it in limited situations as the Court of Appeals has chosen not to make this a published decision. A published decision would be absolutely binding so it is interesting that the case is not being recommended for publication.

This case deals with the issue of whether an employee who claims that an employer has not paid wages due and owing must first file his or her complaint with the Department of Workforce Development's Wage and Hour Division prior to filing a civil action, e.g. small claims court. Levin filed a claim for alleged nonpayment of overtime and vacation pay in small claims court, before a Circuit Court in Dane County. That Circuit Court dismissed his claim, deciding that because an administrative avenue was available to Levin that he did not pursue, he had not exhausted all administrative remedies before filing the case before the circuit court and was therefore precluded from doing so. Levin then proceeded to file an appeal to the Wisconsin Court of Appeals.

Ultimately, the Wisconsin Court of Appeals determined that the circuit court erred in precluding Levin from pursuing his state court claims and reversed the circuit court, sending the case back to the circuit court for further proceedings on Levin's claims. This is called a reverse and remand by the way.

Let's review some background facts. Levin was a former employee of the employer in this case, Gass & Riegert Auto Complex, Inc. ("Gass"). In mid-2007 Levin filed a complaint with the State of Wisconsin Department of Workforce Development ("DWD") alleging that Gass owed him vacation and overtime pay. On August 14, 2007, DWD issued a decision denying Levin's claim but at the same time informing him that he could submit further information regarding his work status to challenge the decision. Levin waited a week before responding to the DWD letter, but did not provide any additional proof as requested by the investigator to dispute his employment status or occupational classification (assuming argument as to whether he was exempt or non-exempt for this article). Levin also failed to supply the DWD with a key piece of information relevant to Gass's written policy as to vacation payouts for terminated employees. Therefore, DWD reiterated its denial in a letter to Levin dated August 27, 2007, and informed Levin of his right for further administrative review. Levin did not proceed to appeal through the DWD but instead filed a small claims complaint in Dane County Small Claims Court on October 3, 2007. As previously stated this claim was dismissed but the Court of Appeals reversed.

The Court of Appeals agreed with Levin that Wis. Stat. sec. 109.03(5) does not require an employee to exhaust his or her administrative remedies prior to pursuing a small claims action in circuit court for wage claims. The Court of Appeals found that Levin, consistent with Wis. Stats. Sec. 109.03(5) had a direct private cause of action against his employer for wages he alleged were due and owing to him and that the statute did not expressly require an exhaustion of available administrative remedies first. What does this mean? The Court of Appeals decided that no employee pursuing a wage claim has to file a claim first with the DWD before filing a circuit court action. However, this case presented an additional question, because this employee had first pursued an administrative complaint before the DWD, and the DWD did not find his claim viable. Thus, the question became did this action require the employee to exhaust all available administrative remedies (i.e. in this case going through with the administrative appeal) prior to filing small claims action?

The Court of Appeals reviewed this issue and concluded that based upon the statutory scheme laid out in Chapter 109, the administrative remedies available under Wis. Stat. sec. 109.09 and sec. 109.11(1) and (2) are not exclusive. Specifically, the Court pointed to Wis. Stat. sec. 109.03(5), which provides a private cause of action to employees seeking to enforce wage claims against employers. Thus, the Court of Appeals did not presume that the administrative

remedies provided by Wis. Stats. secs. 109.09(1) and 109.11(2)(b) were exclusive. The Court also noted that Chapter 109 was silent as to requiring an employee to first pursue an administrative action.

The Court of Appeals found compelling the fact that Chapter 109 provides various administrative, civil, and criminal provisions and remedies that “protect employees through a plethora of administrative and court remedies for employees to settle disputes and collect their wages.” *Levin* (citing *Hubbard v. Messer*, 2003 WI 145, 267 Wis. 2d 92, 673 N.W.2d 676). The Court of Appeals concluded that based on this analysis, the legislature intended to provide more than one remedy to employees to enforce wage claims. Take note, the legislature wants employee to receive their wages.

The next analysis then involved the penalties statute, Wis. Stats. sec. 109.11. According to the Court of Appeals, this section provided an incentive to employees to seek DWD assistance in enforcing their wage claims and to complete that process before filing a wage claim action in circuit court. If an employee goes through the DWD for their wage claim and exhausts all administrative processes including all efforts to settle and compromise, then they are allowed to pursue their claim in circuit court and obtain as a remedy not only wages owed, but also an additional 50 percent of those wages as a penalty. This incentive, according to the Court, is not a requirement. Further, the Court cites to the language in Wis. Stat. sec. 109.11(2)(a), that an employee who commences a wage claim action in state court “before the department has completed its investigation under sec. 109.09(1) and its attempts to compromise and settle the wage claim,” implies that an employee can pull out of the administrative process before it is completed and file a wage claim in circuit court.

Thus, an employee can file a wage claim in circuit court prior to the final conclusion of the DWD.

**PRACTICE TIP FROM THIS CASE:** First of all, make every attempt to clearly delineate in writing what your policies are regarding vacation pay as to terminated employees. Clear policies, and I am surprised in this factual scenario above that the employer did not provide their policy to defend against this claim relevant to vacation payouts, can avoid much confusion. However, if you are presented with a wage claim, know that an employee is not required to file their claim with the DWD and even if they do, within their two year statute of limitation, you can still be pursued in small claims court and/or in civil court if

the amount is higher than small claims limits (currently \$5,000 or less). If a finding is made against you by the DWD regarding any wage claim, think very carefully about not resolving it at that point, because if you are then faced with a circuit court action you could be paying for 1.5 times the wages claimed when the penalties provision kicks in.